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(6)

No. 06-618

In the Supreme Court of the United States

OFFICE OF SENATOR MARK DAYTON,

Appellant,

v.

BRAD HANSON,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR APPELLANT

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APPEAL DOCKETED NOVEMBER 3, 2006
JURISDICTION POSTPONED JANUARY 19, 2007

QUESTIONS PRESENTED

1. Does the Speech or Debate Clause of the U.S. Constitution, U.S. CONST. art. I, § 6, cl. 1, bar federal court jurisdiction of an action brought under the Congressional Accountability Act of 1995, 2 U.S.C. §§ 1301-1438 (2000), by a congressional employee whose job duties are part of the due functioning of the legislative process?

The Court directed the parties to brief the following additional questions:

2. Was the Office of Senator Mark Dayton entitled to appeal the judgment of the Court of Appeals for the District of Columbia Circuit directly to this Court?

3. Was this case rendered moot by the expiration of the term of office of Senator Dayton?

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit, J.S. App. 1a-57a, is reported at 459 F.3d 1. The underlying decision of the U.S. District Court for the District of Columbia is an unreported minute order without opinion. J.S. App. 58a-59a.

JURISDICTION

The U.S. Court of Appeals for the District of Columbia Circuit entered judgment on August 18, 2006. J.S. App. 60a-61a. Appellant timely filed its notice of appeal on October 31, 2006, J.S. App. 90a-94a, and its Jurisdictional Statement on November 3, 2006. This Court has appellate jurisdiction under

section 412 of the Congressional Accountability Act of 1995, 2 U.S.C. § 1412. J.S. App. 65a.

In its Jurisdictional Statement, Appellant requested that the Court treat the Jurisdictional Statement as a petition for a writ of certiorari in the event the Court finds this appeal was improvidently taken and that the sole mode of review of the judgment of the court of appeals is by petition for a writ of certiorari. Appellant respectfully renews that request, although Appellant believes that 2 U.S.C. § 1412 provides this Court with appellate jurisdiction in this case. If this Court treats Appellant's Jurisdictional Statement as a petition for a writ of certiorari, jurisdiction is invoked under 28 U.S.C. § 1254(1).

On January 19, 2007, this Court postponed further consideration of the question of jurisdiction pending hearing on the merits. J.A. 24. This Court has not ruled on the petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Speech or Debate Clause of the United States Constitution, U.S. CONST. art. I, § 6, cl. 1, is reproduced at J.S. App. 62a.

2. Section 1 of the Twentieth Amendment to the United States Constitution, U.S. CONST. amend. XX, § 1, provides as follows:

> The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

STATUTORY PROVISIONS INVOLVED

1. Section 101(9) of the Congressional Accountability Act of 1995, 2 U.S.C. § 1301(9), provides as follows:

> The term "employing office" means—
>
> (A) the personal office of a Member of the House of Representatives or of a Senator;
>
> (B) a committee of the House of Representatives or the Senate or a joint committee;
>
> (C) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or
>
> (D) the Capitol Guide Board, the Capitol Police Board, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment.

2. Subsections 408(a) and (b) of the Congressional Accountability Act of 1995, 2 U.S.C. § 1408(a), (b), are reproduced at J.S. App. 64a.

3. Section 412 of the Congressional Accountability Act of 1995, 2 U.S.C. § 1412, is reproduced at J.S. App. 65a.

4. Section 413 of the Congressional Accountability Act of 1995, 2 U.S.C. § 1413, is reproduced at J.S. App. 63a.

STATEMENT

This case addresses the scope of the immunity of the Speech or Debate Clause of the U.S. Constitution in employment law actions brought under the Congressional Accountability Act of 1995, 2 U.S.C. §§ 1301-1438 (2000) (the "CAA" or "Act"), against the personal office of a United States Senator. The D.C. Circuit, sitting en banc, interpreted CAA §§ 408 and 413, 2 U.S.C. §§ 1408, 1413, in a manner that permits court adjudication of CAA cases in violation of the Speech or Debate Clause. The D.C. Circuit held that the Speech or Debate Clause is not a jurisdictional bar to this case but that the Clause plays some role in the adjudication of CAA cases; however, the court could not reach a majority opinion as to what that role is. While recognizing that this is an "important case" raising "perplexing questions," J.S. App. 31a, 13a, the D.C. Circuit provided no clear guidance on how CAA cases can be adjudicated without violating the Constitution.

1. The CAA applies select provisions of eleven federal employment laws to congressional offices. 2 U.S.C. § 1302(a). The CAA provides covered employees with two alternative means of redress for alleged violations: an administrative hearing through the Office of Compliance, which is "an independent office within the legislative branch," 2 U.S.C. § 1381(a), and a civil action in federal district court. See 2 U.S.C. §§ 1404, 1405, 1408. These are the exclusive means of enforcing the rights granted under the Act. See 2 U.S.C. § 1361(d). The CAA provides that only a congressional "employing office" shall be a defendant in a CAA suit, 2 U.S.C. § 1408(b), and the Act defines the term "employing office," see 2 U.S.C. § 1301(9). The CAA expressly preserves Speech or Debate Clause immunity. See 2 U.S.C. § 1413.

2. Brad Hanson ("Hanson") is a former employee of the now defunct Office of Senator Mark Dayton ("the Dayton Office"). J.S. App. 67a ¶ 3. Senator Dayton represented the state of Minnesota. J.S. App. 68a ¶ 6. As an employee of the Dayton Office, Hanson met regularly with constituents, community groups, and community leaders to determine their concerns and priorities in the healthcare and law enforcement areas. Based on information he gathered from them, he identified and briefed Senator Dayton about opportunities for legislative initiatives. J.S. App. 67a-71a ¶¶ 3, 6-8; 74a-81a. For example, having learned of problems in Medicare reimbursement for ambulances, Hanson held meetings around Minnesota to determine the extent and scope of the problems, developed potential legislative solutions, and advised Senator Dayton that he should sponsor specific legislation and should hold a congressional hearing to address the problems. J.S. App. 71a-72a ¶¶ 9-12; 82a-86a. As a result, Senator Dayton introduced legislation and initiated a congressional committee hearing on Medicare reimbursement for ambulance services. Hanson was one of a few staff members who planned the hearing Senator Dayton initiated and chaired, decided on the issues for the hearing, selected hearing witnesses, and prepared questions that Senator Dayton asked at the hearing. Hanson also developed follow-up questions submitted for the official hearing record. J.S. App. 72a-73a ¶¶ 13-14; 87a-89a.

3. According to Hanson, he began experiencing cardiac arrhythmia in early 2002. His doctor told him that he would need a surgical procedure called a coronary ablation, which would require a short hospitalization, followed by a recovery period of two to three weeks. J.A. 12 ¶ 8. Hanson scheduled a brief meeting with Senator Dayton on July 3, 2002, when the Senator was going to be in the Fort Snelling office where Hanson worked. J.A. 12 ¶ 9. Hanson alleges that the meeting had not gone on for more than five minutes when Senator

Dayton abruptly told him, "You're done." J.A. 13 ¶ 10. According to Hanson, the Senator told him he should no longer report to the office but, rather, should go on medical leave. Hanson was subsequently informed that he would be taken off the payroll on September 30, 2002. J.A. 13 ¶ 11.

On May 29, 2003, Hanson filed suit in the U.S. District Court for the District of Columbia alleging that the Dayton Office had discriminatorily terminated his employment in violation of CAA §§ 201(a)(3) and 202(a), 2 U.S.C. §§ 1311(a)(3), 1312(a), because Senator Dayton erroneously perceived him to be disabled and because he needed to take leave to recover from heart surgery. J.A. 13-14 ¶¶ 13, 16-19. In addition, Hanson alleges that he was a non-exempt employee but was not paid overtime in violation of CAA § 203, 2 U.S.C. § 1313. J.A. 12-13 ¶¶ 6, 13; 15 ¶¶ 20-21.

On September 12, 2003, the Dayton Office moved to dismiss the complaint pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the ground that the Speech or Debate Clause provides the Dayton Office with absolute immunity from the suit. The Dayton Office relied on *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986). Without hearing oral argument, the district court issued a minute order on September 7, 2004, denying, with no stated reason, the motion to dismiss. J.S. App. 58a-59a.

4. The Dayton Office appealed to the D.C. Circuit from the district court's denial of its motion to dismiss for lack of subject matter jurisdiction. The D.C. Circuit, sitting en banc, heard the case.

In a fragmented decision, the D.C. Circuit affirmed the district court's order denying the Dayton Office's motion to dismiss. J.S. App. 27a, 28a, 57a, 60a-61a. The D.C. Circuit

rejected the test it had established in *Browning*, that "a Member's personnel decision is shielded from judicial scrutiny [by the Speech or Debate Clause] when 'the [affected] employee's duties were directly related to the due functioning of the legislative process.' [*Browning*, 789 F.2d] at 929 (emphasis removed)." J.S. App. 9a (second alteration in original); see also J.S. App. 18a, 27a, 28a, 36a, 45a. Aside from the *Browning* test, the only points on which a majority of the circuit court judges agreed are: (i) the Speech or Debate Clause does not bar the court's jurisdiction of Hanson's suit because an examination of the complaint shows that Hanson can make out a prima facie case without relying on legislative acts, J.S. App. 20a, 28a; and (ii) the Speech or Debate Clause plays some role in the adjudication of CAA cases, although the court was unable to reach consensus on what that role is. J.S. App. 21a, 28a, 31a, 54a. Circuit Judge Randolph, joined by Chief Judge Ginsburg and Circuit Judges Henderson and Tatel, found that where the defendant "provide[s] evidence of a legitimate nondiscriminatory reason for the discharge" and "include[s] with this evidence an affidavit from an individual eligible to invoke the Speech or Debate Clause recounting facts sufficient to show that the challenged personnel decision was taken because of the plaintiff's performance of conduct protected by the Speech or Debate Clause," J.S. App. 25a, then "the action most likely must be dismissed," J.S. App. 26a, because "[i]n many cases, the plaintiff would be unable to [demonstrate that the defendant's proffered reason was a pretext for discrimination] without 'draw[ing] in question' the legislative activities and the motivations for those activities asserted by the affiant – matters into which the Speech or Debate Clause prohibits judicial inquiry," J.S. App. 25a (citation omitted) (last alteration in original). Circuit Judge Brown, with whom Circuit Judges Sentelle and Griffith joined, concurring in the judgment, found that the Speech or Debate Clause "functions [in CAA cases] only as a testimonial and

documentary privilege, to be asserted by members and qualified aides if they are called upon to produce evidence" regarding legislative acts, but that "as long as members and their aides are not themselves 'questioned,' an inquiry into legislative acts does not implicate the Speech or Debate Clause." J.S. App. 56a. Circuit Judge Rogers, concurring in part and in the judgment, "agree[d] that the [Speech or Debate] Clause's evidentiary privilege has a role to play," J.S. App. 28a (internal citations omitted), but did not identify what that role is and "le[ft] open the question of how the Clause may limit evidence offered by parties in CAA litigation," J.S. App. 29a.

5. On October 31, 2006, the Dayton Office filed its notice of appeal to this Court. J.S. App. 90a-94a. On November 3, 2006, the Dayton Office filed its Jurisdictional Statement with the Court.

6. At noon on January 3, 2007, Senator Dayton's term of office expired. See U.S. CONST. amend. XX, § 1 ("[T]he terms of Senators and Representatives [shall end] at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified . . . .").[1] In turn, the Dayton Office closed. Br. App. 1a, 6a-13a.

SUMMARY OF ARGUMENT

1. This appeal asserts that the D.C. Circuit's judgment, allowing court adjudication of CAA claims by employees whose job duties are part of the due functioning of the legislative process, interprets and applies provisions of the CAA, 2 U.S.C. §§ 1408, 1413, in a manner that violates the U.S. Constitution's Speech or Debate Clause. Accordingly,

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[1] The Court may take judicial notice of "the election and resignations of [S]enators." See *Brown v. Piper*, 91 U.S. 37, 42 (1875).

this appeal is upon the constitutionality of provisions of the CAA and is properly brought under CAA § 412, 2 U.S.C. § 1412. CAA § 412 does not preclude an appellant from also filing a petition for a writ of certiorari. In the event the Court concludes that CAA § 412 does not provide a proper basis for this appeal, the Dayton Office requests that the Court treat the Jurisdictional Statement as a petition for a writ of certiorari under 28 U.S.C. § 1254(1) and accept jurisdiction of this appeal on that basis.

2. The CAA explicitly requires that the defendant in a CAA action be the employing office "alleged to have committed the violation, or in which the violation is alleged to have occurred," 2 U.S.C. § 1408(b), which in this case is the Dayton Office. The Dayton Office, however, ceased to exist at noon on January 3, 2007, when Senator Dayton's term of office as a United States Senator ended.

a. When a defendant ceases to exist, the case cannot continue, and the litigation against the defendant abates, absent statutory language to the contrary. See *Def. Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 634 (1949). The plain language of the CAA does not provide for non-abatement of actions. Furthermore, when Congress intends non-abatement it expressly so states.

An abated action does not survive unless a successor exists and is timely substituted for the defendant. See *Snyder v. Buck*, 340 U.S. 15, 19 (1950). No successor to the Dayton Office exists. Furthermore, well-established principles of statutory construction and sovereign immunity preclude the courts from inferring a successor. See *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004); *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Moreover, CAA § 410, 2 U.S.C. § 1410, expressly

prohibits reference to outside statutory authority to enlarge the CAA's waiver of sovereign immunity.

b. Because only one active combatant, Hanson, is extant, this case no longer presents an Article III case or controversy and should be dismissed as moot. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997).

3. Members of Congress are protected by the absolute immunity of the Speech or Debate Clause, U.S. CONST. art. I, § 6, cl. 1. The CAA expressly preserves Speech or Debate Clause immunity. 2 U.S.C. § 1413. The Speech or Debate Clause is grounded in separation of powers principles. The central role of the Clause is to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Gravel v. United States*, 408 U.S. 606, 617 (1972). The Clause ensures legislative independence by providing members of Congress with an absolute immunity that protects them "not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). The privilege ensures the independence of individual legislators. *United States v. Brewster*, 408 U.S. 501, 507 (1972).

This Court has consistently "read the Speech or Debate Clause broadly to effectuate its purposes," *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 501 (1975), and has repeatedly held that the Clause protects *all* acts that are within the "legitimate legislative sphere," *id.* at 503. An act is within the legitimate legislative sphere when it is part of the "*due* functioning of the [legislative] process." *Brewster*, 408 U.S. at 515-16. The Speech or Debate Clause is not merely an evidentiary privilege; acts within the legislative sphere "may not serve as a predicate for a suit." *Doe v. McMillan*, 412 U.S.

306, 318 (1973). Also, courts are precluded from adjudicating any case that would require questioning, *Gravel*, 408 U.S. at 628-29, or would reveal information about a legislative act, *United States v. Helstoski*, 442 U.S. 477, 490 (1979), or the motivation for such an act, *Brewster*, 408 U.S. at 512; *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("The claim of an unworthy purpose does not destroy the privilege. . . . [I]t [is] not consonant with our scheme of government for a court to inquire into the motives of legislators . . . ."), or would reveal communications between a Member and his aides regarding a legislative act, *Gravel*, 408 U.S. at 628-29. Furthermore, a Member cannot be made to answer -- in terms of defending himself -- for a legislative act or his motivation for such an act. See *id.* at 616.

a. The Court has recognized that it is literally impossible, in view of the complexities of the legislative process, for Members to perform their constitutional duties alone. Rather, they must delegate some of those duties to aides and assistants. *Gravel*, 408 U.S. at 616-17. The Court also has recognized that such employees are the Members' alter egos. *Id.* Therefore, legislative acts are performed not only by a Member but also by his aides and assistants. Legislative acts of alter egos include gathering and conveying to the Member information on matters critical to the Member's legislative agenda, see *Eastland*, 421 U.S. at 504, determining legislative initiatives, preparing for and attending congressional hearings, and communicating with a Member about any matter related to legislative acts, see *Gravel*, 408 U.S. at 609, 615-17, 624, 628-29.

A Member cannot perform his constitutional duties effectively or represent his constituents properly unless the Member manages his alter egos. When a Member manages his alter egos, the Member is taking an action that is part of the due functioning of his legislative process because by managing his

alter egos the Member is making his legislative process function the way he deems it should function to fulfill his constitutional duties. When a Member hires, assigns duties and geographic locations to, promotes, demotes, disciplines, and fires an alter ego, for example, those acts are part of the functioning of his legislative process. Therefore, the Speech or Debate Clause provides absolute immunity for those personnel actions, irrespective of the Member's motive for taking them.

Hanson's job duties were part of the due functioning of the legislative process. Therefore, the Speech or Debate Clause precludes court adjudication of Hanson's discrimination claims because they are predicated on a legislative act: his termination. This is true irrespective of the motive for the termination because a court cannot question a Member about the motive for a legislative act. Furthermore, Hanson cannot advance his case without revealing information about the termination, communications between him and Senator Dayton about the termination, and the motive for the termination. Also, the defense of the case would require Senator Dayton to answer for the termination and his motivation for the termination, which would violate the Speech or Debate Clause.

The Speech or Debate Clause also bars court adjudication of Hanson's overtime claim because determining whether Hanson is exempt from the overtime pay provisions requires examining his job duties in detail and thus inquiring into and revealing information about legislative acts because his job duties are part of the due functioning of the legislative process. Accordingly, the D.C. Circuit erred in holding that the district court is not barred from adjudicating this case.

b. The Court's decision in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), that the President, who has no textual immunity, is absolutely immune for personnel actions taken against a

Pentagon analyst, supports the soundness of the immunity test urged herein. Because the President's inferred, absolute immunity and Members' Speech or Debate Clause immunity are grounded in separation of powers principles, it would be incongruous for the President to have greater protection from Judicial Branch intrusion into employment decisions than do members of Congress.

c. Regardless of who the named defendant is, the Speech or Debate Clause bars court adjudication of any case that is predicated on a legislative act, or that would require questioning or would reveal information about a legislative act or the motivation for such an act, or would reveal communications between a Member and his aides regarding a legislative act, or would make a Member answer -- in terms of defending himself -- for a legislative act or his motivation for such an act.

d. The D.C. Circuit erred in relying on *Forrester v. White*, 484 U.S. 219 (1988), because that case addressed common law, judicial immunity, not textual Speech or Debate Clause immunity. Judicial immunity is narrower than Speech or Debate Clause immunity, and the jurisprudence with respect to the two immunities is not interchangeable. See *Eades v. Sterlinske*, 810 F.2d 723, 725 n.1 (7th Cir. 1987) ("[J]udicial immunity affords less protection than legislative immunity under the Speech or Debate Clause." (citing *Dennis v. Sparks*, 449 U.S. 24, 30 (1980))).

ARGUMENT

I. THE DAYTON OFFICE IS ENTITLED TO APPEAL THE JUDGMENT OF THE D.C. CIRCUIT TO THIS COURT

A. This Case Is Properly Before This Court On Appeal From The D.C. Circuit Pursuant To CAA § 412

The Dayton Office filed this appeal to challenge the D.C. Circuit's judgment that federal court adjudication of Hanson's CAA claims does not violate the Speech or Debate Clause of the Constitution. The Dayton Office appealed to this Court pursuant to CAA § 412, 2 U.S.C. § 1412, which authorizes direct appeal to this Court "from any interlocutory or final judgment, decree, or order of a court upon the constitutionality of any provision of this Act," and requires that this Court "shall, if it has not previously ruled on the question, accept jurisdiction over the appeal . . . and expedite the appeal to the greatest extent possible." As discussed below, this appeal satisfies the criteria of CAA § 412.

CAA § 408 authorizes federal district court adjudication of CAA claims, but CAA § 413 preserves Members' Speech or Debate Clause immunity. See 2 U.S.C. §§ 1408(a), 1413. Hanson sued the Dayton Office in federal district court pursuant to CAA § 408. See J.A. 11 ¶ 2. The Dayton Office has alleged that court adjudication of Hanson's claims would violate the Speech or Debate Clause. The D.C. Circuit concluded that the Speech or Debate Clause does not constitutionally bar court adjudication of Hanson's claims. Therefore, the D.C. Circuit's judgment allowing court adjudication of this suit is a "judgment . . . upon the constitutionality of [CAA §§ 408 and 413]" as applied to CAA

suits, such as Hanson's, that challenge a Member's management decisions affecting an employee whose job duties are part of the due functioning of the legislative process. 2 U.S.C. § 1412(a). This Court "has not previously ruled on the question" of whether the Speech or Debate Clause precludes federal court adjudication of Hanson's claims. 2 U.S.C. § 1412(b). Accordingly, this case is within the Court's jurisdiction under CAA § 412.

B. This Action Is Also Properly Before This Court On A Petition For A Writ Of Certiorari

This action is properly reviewable by this Court not only by appeal under CAA § 412 but also by writ of certiorari pursuant to 28 U.S.C. § 1254(1). Nothing in CAA § 412 precludes this Court from treating this appeal as a petition for a writ of certiorari.[2] Further, the Dayton Office effectively filed a timely[3] petition for a writ of certiorari by requesting that its Jurisdictional Statement be treated in the alternative as a petition for a writ of certiorari if this Court determines that appeal pursuant to CAA § 412 was improvidently taken. In that event, the Court should grant certiorari because of the importance of the Speech or Debate Clause in our constitutional scheme and because the D.C. Circuit's decision allowing court adjudication of a suit challenging a Member's personnel decisions with respect to an employee whose job

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[2] Moreover, this Court has the power to treat this appeal as a petition for a writ of certiorari. Cf. *Bush v. Gore*, 531 U.S. 1046, 1046 (2000) (treating application for stay of lower court's mandate as a petition for a writ of certiorari).

[3] The deadline for filing a petition for a writ of certiorari is ninety days after entry of the judgment. See 28 U.S.C. § 2101(c). The D.C. Circuit entered judgment on August 18, 2006, and the Dayton Office filed its Jurisdictional Statement on November 3, 2006.

duties were part of the due functioning of the legislative process violates the Speech or Debate Clause's bar of court adjudication of suits predicated on legislative acts or the motivation for such acts, undercuts separation of powers principles, and impermissibly allows judicial intrusion into the legislative sphere.

II. THE EXPIRATION OF SENATOR DAYTON'S TERM OF OFFICE RENDERED THE CASE MOOT BECAUSE THE DAYTON OFFICE, THE SOLE DEFENDANT, NO LONGER EXISTS

When Senator Dayton's term of office ended at noon on January 3, 2007, the sole defendant in this action, the Dayton Office, ceased to exist. As explained below, because only one active combatant remains in this litigation, this case no longer presents an Article III case or controversy and should be dismissed as moot. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997).

A. This Action Against The Dayton Office Abated When The Office Ceased To Exist Because The CAA, The Only Applicable Statute, Does Not Provide For Non-Abatement Or For A Successor Defendant

CAA § 408 explicitly requires that the defendant in a CAA action "shall be the employing office alleged to have committed the violation, or in which the violation is alleged to have occurred."[4] 2 U.S.C. § 1408(b). The term "employing office"

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[4] Courts have dismissed defendants that are not included among the employing offices the CAA delineates. See, *e.g.*, *Moss v. Lenhardt*, C.A. No. 02-01622 (RMC), Mem. Op. at 5 (D.D.C. Jan. 24, 2003) (dismissing case because "[n]either an individual nor the United States Senate

is a specifically defined term in the CAA. See 2 U.S.C. § 1301(9). As relevant to this case, the term "employing office" means "the personal office . . . of a Senator." 2 U.S.C. § 1301(9)(A). As set forth in Hanson's complaint, the alleged CAA violations were committed by and in the Dayton Office -- the personal office of Senator Dayton when he served in the United States Senate.[5] J.A. 11 ¶¶ 3, 4.

The Dayton Office, however, ceased to exist when Senator Dayton's term of office expired on January 3, 2007. The personal office of a Senator exists to assist a Senator during his or her term of office. See, *e.g.*, Br. App. 14a-15a (office purchases computer equipment with allocated funds); Br. App. 2a-4a, 16a (office provides constituent services on behalf of the Senator); Br. App. 5a (office ensures Senator's compliance with mass mailing requirements); Br. App. 17a-19a (office processes vouchers for all official expenses); Br. App. 20a-21a (office ensures compliance with legal requirements, including tracking overtime and completing employment eligibility forms required by law). Upon expiration of a Senator's term of

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constitutes an 'employing office' under section 1301(9) of the CAA") (unpublished); *Moore v. Capitol Guide Bd.*, 982 F. Supp. 35, 39 n.5 (D.D.C. 1997) (dismissing several named defendants because "the language of the statute requires an employee filing a claim in District Court to bring suit against the single employing office responsible for the alleged violation").

[5] The CAA provides a limited waiver of sovereign immunity with respect to claims brought against an employing office. 2 U.S.C. § 1408(b). "[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996). Therefore, any "'limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.'" *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981) (quoting *Soriano v. United States*, 352 U.S. 270, 276 (1957)). As such, the statutory language must be strictly construed, and the term "employing office" cannot be judicially expanded.

office, the office has no further authority to perform this function -- all office accounts with Senate support offices, such as the Stationery Room and the Senate Library, must reflect a zero balance; all employees must be removed from the payroll; the office cannot incur any financial obligations, including telephone and travel expenses; all subscriptions must be canceled; the Senate Post Office stops delivering mail to the office; and the Senator and his or her employees are required to vacate the physical office space. See Br. App. 1a, 6a-13a. As such, when Senator Dayton's term of office expired, the function of the Dayton Office -- to assist Senator Dayton while he served in the United States Senate -- was fully completed, and, having no further function or the ability to function, the Dayton Office ceased to exist. Cf. *Skolnick v. Parsons*, 397 F.2d 523, 525 (7th Cir. 1968) (holding that federal commission became *functus officio* once it completed its assignment).

When a defendant ceases to exist, a case cannot continue, and the litigation against the defendant abates, absent statutory language to the contrary. See *Def. Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 634 (1949) (requiring express statutory non-abatement provision before finding that action did not abate against dissolved government corporation); see also *Snyder v. Buck*, 340 U.S. 15, 18-19 (1950) (holding that action against the Paymaster General abated when he retired because statute did not have a non-abatement provision and because petitioner had failed to substitute successor officer within the statutorily required six-month period); *Asociacion de Empleados del Area Canalera (ASEDAC) v. Panama Canal Comm'n*, 453 F.3d 1309, 1314 (11th Cir. 2006) (holding that action had abated against government entities because statute terminated the entities but did not include non-abatement provision).

In determining whether the applicable statute provides for non-abatement, the statutory language controls. See *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." (citations omitted)). "[T]he sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce [the statute] according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). Moreover, courts cannot enlarge the statute by adding a non-abatement provision Congress omitted, even if the omission "lead[s] to a harsh outcome." *Id.* at 538; *ASEDAC*, 453 F.3d at 1316 (refusing to infer a non-abatement clause in a statute even though this abated litigation that had been pending for over three years). When Congress intends for non-abatement of actions, it expressly so states. See, *e.g.*, 5 U.S.C. § 907(c) (2000) (providing that actions by or against the head of an executive branch agency do not abate by reason of an agency reorganization plan and that "within twelve months after the reorganization plan takes effect," a party may move for substitution of "the successor of the head . . . under the reorganization effected by the plan or, if there is no successor, against such agency or officer as the President designates").[6]

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[6] See also 15 U.S.C. § 767(d) (2000) (providing that "[n]o cause of action by or against any department or agency, functions of which are transferred by [reorganization of executive branch functions and agencies to create the Federal Energy Commission] . . . shall abate by reason of the [reorganization]" and permitting substitution of the United States in such proceedings); 20 U.S.C. § 3505(d), (e) (2000) (providing that "[n]o cause of action by or against any department or agency, functions of which are transferred by [reorganization of the Department of Education] . . . shall abate by reason of the [reorganization]" and permitting substitution of the Secretary of Education in such proceedings); 22 U.S.C. § 6615(d), (e) (2000) (providing for "[n]onabatement of proceedings" and "[c]ontinuation

The CAA does not include a non-abatement provision. Although some CAA actions will abate and will leave a covered employee without the ability to seek relief, abatement does not eviscerate the CAA or lead to the conclusion that Congress intended to include a non-abatement provision in the statute. Rather, the statute itself mitigates the potential for abatement by providing an expedited hearing process through the Office of Compliance ("OC"). See 2 U.S.C. §§ 1402-1407. When a complaint is filed with the OC, the hearing must be held "no later than 60 days after filing of the complaint," and the OC may grant only one 30-day extension for good cause. 2 U.S.C. § 1405(d)(2). The covered employee alone has the right to decide whether to proceed through the expedited process or to file a complaint in district court. 2 U.S.C. § 1404. The covered employee runs the same risk as any other litigant -- that subsequent events may lead to the abatement of the action. Although occasional abatement may be unfortunate, abatement is not an absurd consequence, and the CAA should therefore be enforced as written. See *Lamie*, 540 U.S. at 534.

Further, Congress, which understands the vagaries of congressional terms, could have provided for Congress or the Senate to be the defendant in CAA actions rather than "the personal office of a Member," 2 U.S.C. § 1301(9)(A), an entity that will necessarily cease to exist at some point. Congress did not so provide. Instead, Congress considered and then rejected statutory language that would have permitted employment lawsuits against "the Congress" or against "the Senate." See, *e.g.*, S. 579, 103d Cong. § 2(c)(1) (1993) (would have permitted employment suits "against the Congress" in federal

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of proceedings with substitution of parties" in connection with the reorganization and consolidation of the Foreign Affairs agencies); 22 U.S.C. § 6543(c), (d) (2000) (same); 42 U.S.C. § 7295(d), (e) (2000) (similar -- Department of Energy).

court); H.R. 2099, 103d Cong. § 2(c)(1) (1993) (would have permitted a civil action "against the Congress or the congressional employer of such employee" in federal court); H.R. 4444, 103d Cong. § 102(c)(1) (1994) (would have permitted employment suits "against the Congress" in federal court); H.R. 4850, 103d Cong. § 2(c)(1) (1994) (would have permitted employment suits "against the Congress" in federal court); H.R. 4822, 103d Cong. § 306(b) (reported in the Senate Oct. 3, 1994) ("the defendant shall – (1) in an action by an employee of the Senate, be the Senate"). Accordingly, this action abated on January 3, 2007.

An abated action does not survive unless a successor defendant exists and is timely substituted for the named defendant. *Snyder*, 340 U.S. at 17-19 (affirming dismissal of action because neither party substituted respondent's successor after action abated against respondent); *ASEDAC*, 453 F.3d at 1314 (affirming dismissal of action because the lawsuit had abated against government entities and Congress had not "provided for a successor that [could] stand in for these defunct entities as a defendant in this litigation"). The CAA does not contain a successor provision. Moreover, the Court cannot name or infer a government successor because "the United States may not be sued without its consent." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). In addition, the CAA expressly prohibits reference to outside statutory authority to enlarge the CAA's waiver of sovereign immunity. See 2 U.S.C. § 1410 ("Except as expressly authorized by sections 1407, 1408, and 1409 of this title, the compliance or noncompliance with the provisions of this [Act] . . . shall not be subject to judicial review."); see also 2 U.S.C. § 1413 ("The authorization to bring judicial proceedings under sections 1405(f)(3), 1407, and 1408 of this title shall not constitute a waiver of sovereign immunity for any other purpose . . . .").

Because the CAA does not provide for either non-abatement or a successor defendant and because the Dayton Office no longer exists, this case abated at noon on January 3, 2007, for lack of a defendant. See *Snyder*, 340 U.S. at 19-20.

B. This Case No Longer Presents A Case Or Controversy And Should Be Dismissed As Moot

In the absence of a live controversy, a federal court is deprived of jurisdiction because "Article III, § 2, of the Constitution confines federal courts to the decision of 'Cases' or 'Controversies.'" *Arizonans for Official English*, 520 U.S. at 64. "'[An] actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Id.* at 67 (citation omitted). When there are no longer two parties to the litigation, it no longer presents a case or controversy. See *Ellis v. Dyson*, 421 U.S. 426, 434 (1975) ("[I]t is elemental that there must be parties before there is a case or controversy."); see also *Martinez v. Winner*, 800 F.2d 230, 231 (10th Cir. 1986) ("There can be no live controversy without at least two active combatants."). When a case no longer presents an actual controversy, the case is moot. See *Arizonans for Official English*, 520 U.S. at 67 (holding case moot because it no longer presented an actual controversy).

Because one of the adverse parties to this litigation, the Dayton Office, ceased to exist, this case no longer meets Article III's "case or controversy" requirement. Accordingly, the Court should dismiss the case as moot.

III. THE SPEECH OR DEBATE CLAUSE BARS FEDERAL COURT JURISDICTION OF THIS CAA ACTION

Members of Congress are protected by Speech or Debate Clause immunity, U.S. CONST. art. I, § 6, cl. 1. The CAA expressly preserves Speech or Debate Clause immunity. 2 U.S.C. § 1413 ("The authorization to bring judicial proceedings under [the CAA] . . . shall not constitute a waiver of . . . the privileges of any Senator or Member of the House of Representatives under article I, section 6, clause 1, of the Constitution . . . ."). As explained below, in most cases, when an employee's job duties are part of the due functioning of the legislative process, the Speech or Debate Clause bars court adjudication of the employee's CAA claims because they are necessarily predicated or rely on, or require questioning or reveal information about, a legislative act or the motive for it, or require a Member to answer -- in terms of defending himself -- for a legislative act or the motivation for such an act. Therefore, the D.C. Circuit erred in affirming the decision of the district court denying the Dayton Office's motion to dismiss.

The Speech or Debate Clause is a "'great and vital privilege . . . without which all other privileges would be comparatively unimportant or ineffectual.'" *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1880) (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, § 866). The central role of the Clause is to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." *Gravel v. United States*, 408 U.S. 606, 617 (1972) (citing *United States v. Johnson*, 383 U.S. 169, 181 (1966)). The Clause is grounded in separation of powers principles that are necessary "to preserve the constitutional structure of separate, coequal, and independent branches of

government." *United States v. Helstoski*, 442 U.S. 477, 491 (1979). The Clause "insure[s] that the legislative function the Constitution allocates to Congress may be performed independently," *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975), and that the "wisdom of congressional approach or methodology is not open to judicial veto," *id.* at 509.

The Speech or Debate Clause privilege is "secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office, without fear of prosecutions, civil or criminal." *Coffin v. Coffin*, 4 Mass. (1 Tyng) 1, 27 (1808).[7] The Clause ensures that legislators are not diverted from their constitutional duties. *Eastland*, 421 U.S. at 503. The Speech or Debate Clause privilege "is not so much the privilege of the house as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. . . . [H]e cannot be deprived [of the privilege] . . . by an act of the legislature." *Coffin*, 4 Mass. (1 Tyng) at 27; see also *United States v. Brewster*, 408 U.S. 501, 507 (1972) (the purpose of the privilege is "to protect the integrity of the legislative process by insuring the independence of *individual legislators*" (emphasis added)).

"Without exception, [the Court's] cases have read the Speech or Debate Clause broadly to effectuate its purposes." *Eastland*, 421 U.S. at 501; see, *e.g.*, *Brewster*, 408 U.S. at 516

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[7] This Court has stated that *Coffin* "is, perhaps, the most authoritative case in this country on the construction of the provision [Speech or Debate Clause] in regard to freedom of debate in legislative bodies, and being so early after the formation of the Constitution of the United States, is of much weight." *Kilbourn*, 103 U.S. at 204.

("In its narrowest scope, the Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers."); *Gravel*, 408 U.S. at 618 ("Rather than giving the Clause a cramped construction, the Court has sought to implement its fundamental purpose of freeing the legislator from . . . judicial oversight that realistically threatens to control his conduct as a legislator."); see also *Coffin*, 4 Mass. (1 Tyng) at 27 (The Clause "ought not to be construed strictly, but liberally, that the full design of it may be answered. . . . [The privilege] secur[es] to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office.").

It is well settled that the Speech or Debate Clause protects all legislative acts, not just speeches and debates on the floors and at committee hearings of the House and Senate. This Court has repeatedly held that the Clause protects *all* acts that are within the "legitimate legislative sphere." *Eastland*, 421 U.S. at 503; see also *Doe v. McMillan*, 412 U.S. 306, 312-13 (1973); *Gravel*, 408 U.S. at 624-25. An act is within the legitimate legislative sphere when it is "part of the legislative process—the *due* functioning of the process." *Brewster*, 408 U.S. at 516.

Speech or Debate Clause immunity is absolute:

> [W]hether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled. We reaffirm that once it is determined that Members are acting within the

> "legitimate legislative sphere" the Speech or Debate Clause is an absolute bar to interference.

Eastland, 421 U.S at 503 (citing *McMillan*, 412 U.S. at 314).

Further, the Speech or Debate Clause protects not only "against inquiry into acts that occur in the regular course of the legislative process" but also against inquiry "into the motivation for those acts." *Brewster*, 408 U.S. at 525. A privilege is no longer absolute if the actor must explain his motive. See *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("The privilege would be of little value if [legislators] could be subjected . . . to the hazard of a judgment against them based upon a jury's speculation as to motives."); *id.* ("The claim of an unworthy purpose does not destroy the privilege. . . . [I]t [is] not consonant with our scheme of government for a court to inquire into the motives of legislators . . . ."). All acts, no matter how reprehensible, that are within the legislative sphere are beyond court review. *Eastland*, 421 U.S. at 510.

Also, the Speech or Debate Clause protects Members "'not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Id.* at 503 (quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)). Thus, the Clause is not merely an evidentiary privilege. Acts within the legislative sphere "may not serve as a predicate for a suit." *McMillan*, 412 U.S. at 318. Court adjudication is permissible only if the case "does not rely on legislative acts or the motivation for legislative acts." *Brewster*, 408 U.S. at 512. The Clause precludes any person from advancing his case by "[r]evealing information as to a legislative act," *Helstoski*, 442 U.S. at 490, or by revealing communications between a Member and his aide regarding a legislative act, *Gravel*, 408 U.S. at 628-29. Also, a Member cannot be made to answer --

in terms of defending himself -- for a legislative act or his motivation for such an act. See *id.* at 616.

A. Courts Cannot Adjudicate CAA Cases Brought By Employees Whose Job Duties Are Part Of The Due Functioning Of The Legislative Process

The Speech or Debate Clause bars court adjudication of CAA discrimination claims brought by employees whose job duties are part of the due functioning of the legislative process because such claims are predicated or rely on, or would require questioning or would reveal information about, a legislative act or the motive for it, or would require the Member to answer -- in terms of defending himself -- for a legislative act or the motivation for such an act.

This Court has recognized that legislative acts are performed not only by Members but also by the Members' aides and assistants:

> [I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, *United States v. Johnson*, 383 U.S. 169, 181 (1966) —will inevitably be diminished and frustrated.

Gravel, 408 U.S. at 616-17; see also *Davis v. Passman*, 442 U.S. 228, 254 (1979) (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting) ("A Congressman simply cannot perform his constitutional duties effectively, or serve his constituents properly, unless he is supported by a staff in which he has total confidence."); *McMillan*, 412 U.S. at 317-18 (affirmed dismissal of case as to aides and congressional consultants on Speech or Debate Clause immunity basis because case against them was predicated on their legislative acts; dismissal of case against congressional functionaries proper if, on remand, evidence shows that their actions were within the legislative sphere), *on remand*, *Doe v. McMillan*, 566 F.2d 713, 715, 718 (D.C. Cir. 1977) (case against congressional functionaries dismissed on Speech or Debate Clause immunity basis). Thus, the job duties of a Member's alter ego are legislative acts.

Given that a Member cannot perform his constitutional duties without the day-to-day assistance of his aides, who are his alter egos, it follows that a Member cannot effectively perform his constitutional duties or represent his constituents properly unless the Member manages his alter egos. To make his legislative process function, a Member must hire, assign duties and locations to, evaluate the performance of, promote, demote, discipline, fire and otherwise manage his alter egos. When the Member takes such personnel actions with respect to employees whose job duties are part of the due functioning of the legislative process, the Member's personnel actions are also part of the due functioning of the legislative process: they are actions the Member takes to make his legislative process function. The Member is not just hiring and managing an employee; the Member is choosing his "second self" and is determining what his second self will do and how he will do it. See *Passman*, 442 U.S. at 254 (Powell, J., joined by Burger, C.J., and Rehnquist, J., dissenting) (stating that a Member's

employment decisions "are bound up with the conduct of his duties"). Because those personnel actions are part of the due functioning of the legislative process, the Speech or Debate Clause provides absolute immunity for them, irrespective of the Member's motive for taking such actions.[8] See *Eastland*, 421 U.S. at 510; *Tenney*, 341 U.S. at 377.

Employment discrimination claims that challenge a Member's decision to terminate an employee whose job duties are part of the due functioning of the legislative process cannot be adjudicated without violating the Member's Speech or Debate Clause privilege because such claims are predicated on a legislative act: the termination. Furthermore, the case cannot be adjudicated without "questioning" the termination, *Gravel*, 408 U.S. at 628-29, and the employee cannot advance his case without "revealing information as to a legislative act," the termination, *Helstoski*, 442 U.S. at 490. Cf. *Nixon v. Fitzgerald*, 457 U.S. 731, 762 (1982) (Burger, C.J., concurring) ("Absent absolute immunity, . . . each suit . . . would involve some judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the

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[8] The Dayton Office's proposed test -- whether the employee's job duties are part of the due functioning of the legislative process -- represents a minor modification of the test articulated in *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986), which was rejected by the en banc D.C. Circuit below. To the extent the *Browning* test, which stated that a legislative act is one that is "*directly related to the due functioning of the legislative process*," *id.* at 929, is broader than *Brewster*'s test that a legislative act must be "part of . . . the *due* functioning of the [legislative] process," *Brewster*, 408 U.S. at 516, the *Browning* test is too broad. Furthermore, the *Browning* court apparently excluded court adjudication of all employment cases brought by employees whose job duties are directly related to the due functioning of the legislative process, while the test urged herein allows for court adjudication of some CAA employment claims brought by employees whose job duties are part of the due functioning of the legislative process.

information on which it was based, and who supplied the information."). In addition, adjudicating a discrimination claim would require the Member to answer -- in terms of defending himself -- for the termination and his motive for the termination. See *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981).

Moreover, an allowable remedy under the CAA for an employee who prevails on his discrimination claim is reinstatement to his former job.[9] See 42 U.S.C. § 2000e-5(g)(1) (2000) ("the court may . . . order . . . reinstatement"), as incorporated in 2 U.S.C. § 1311(b)(1)(A). It is difficult to imagine a more egregious intrusion by the Judicial Branch into a Member's sphere of constitutional duties than allowing a court to determine that a particular person will be the Member's alter ego, notwithstanding the Member's assessment that the person's employment should be terminated. Such intrusion would contravene this Court's guidance that "[t]he wisdom of congressional approach or methodology is not open to judicial veto," *Eastland*, 421 U.S. at 509, and that the Clause "insure[s] that the legislative function the Constitution allocates to Congress may be performed independently," *id.* at 502. Examples of other CAA remedies that raise serious separation of powers concerns include promotion, geographic reassignment, and change in legislative job responsibilities.[10]

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[9] Given the cessation of the Dayton Office, reinstatement is not an option in this case.

[10] For example: (i) a court could determine that employee X, rather than employee Y, should have been promoted to the position of legislative director, and the court could order the employee's promotion; or (ii) a Member could determine that an employee who had an expertise in water rights should be relocated to another area of the state where the majority of constituents having water rights concerns reside, and a court could determine that the Member had relocated the employee for discriminatory

All of these remedies would interfere with the Member's independent judgment as to how to carry out his constitutional duties and would deny voters the right to determine who will make legislative decisions for them.[11]

Furthermore, such judicial intrusion cannot be circumvented by merely disallowing certain remedies. The immunity protects a Member "not only from the consequences of litigation's results but also from the burden of defending [himself]." *Dombrowski*, 387 U.S. at 85. "[A] private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks . . . and legislative independence is imperiled." *Eastland*, 421 U.S. at 503.

This is not to say that all CAA discrimination claims by employees whose job duties are part of the due functioning of the legislative process would be barred by the Speech or Debate Clause. For example, suppose that a Member creates a sexually hostile work environment and a female employee whose job duties are part of the due functioning of the legislative process files a CAA suit in federal court. Groping employees and telling lewd jokes are not legislative acts because they are objectively "beyond the apparent needs of the '*due* functioning of the [legislative] process.'" *McMillan*, 412 U.S. at 317

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reasons and could order the return of the employee to her original work station; or (iii) a court could determine that a legislative aide had been discriminatorily denied being assigned to a particularly desirable legislative issue and could order reassignment.

[11] In addition, although not applicable in this case due to the cessation of the Dayton Office, such remedies could raise political question problems in other CAA cases due to a lack of judicially manageable standards for determining such remedies. See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

(quoting *Brewster*, 408 U.S. at 516) (alteration in original).[12] Therefore, such a claim would not be predicated on or in most cases question a legislative act. Rather, a court's determination in a hostile work environment case focuses on "whether an environment is sufficiently hostile or abusive," *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998), which requires consideration of such things as the "'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance,'" *id.* at 787-88 (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993)). Accordingly, the Speech or Debate Clause would not bar federal court adjudication of such a claim.

Even if this Court were to determine that personnel actions against alter egos are not, in and of themselves, legislative acts, the Speech or Debate Clause would preclude adjudication of a CAA case if the challenged personnel action was related to an employee's performance of those job duties that are legislative acts. For example, if an employee alleged discriminatory discharge and the Member asserted that he had terminated the employee because he had failed to perform his legislative duties to the Member's satisfaction, then the case could not be adjudicated without questioning and revealing information about legislative acts, i.e., the employee's legislative job duties.

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[12] In contrast, whether a discriminatory termination is "beyond the apparent needs of the due functioning of the legislative process" is a question a court could never reach when the employee's duties are part of the due functioning of the legislative process. The termination of such an employee is, in and of itself, a legislative act, and, on that basis alone, the Speech or Debate Clause bars adjudication of any case that is predicated on or would question the termination. A court cannot question the motive for the termination. See *Brewster*, 408 U.S. at 525. Further, "[t]he claim of an unworthy purpose does not destroy the privilege." *Tenney*, 341 U.S. at 377.

To preclude adjudication of such a case in violation of the Speech or Debate Clause, a Member would have to submit an affidavit to a court stating that the employee had been discharged for poor performance of a legislative act, but the Member could not be required to reveal details about the termination that would reveal a legislative act; rather, a court would have to accept the Member's statement as true. Although this procedure is at once too easy and too hard (because such reasons for termination can be concocted, but in establishing the reason the Member cannot be made to reveal a legislative act), it is the only procedure that would preclude judicial intrusion into the legislative sphere.

In summary, when an employee whose job duties are part of the due functioning of the legislative process brings a CAA claim, in most instances the Speech or Debate Clause will bar court adjudication of the claim because the personnel action itself is a legislative act, and, therefore, the claim will be predicated on a legislative act and/or will require questioning about or will reveal information of a legislative act or the motive for that legislative act, and/or will require a Member to answer -- in terms of defending himself -- for his legislative act and/or his motive. Furthermore, even if this Court were to determine that a personnel action against such an employee is not, in and of itself, a legislative act, the adjudication of any claim that relies on or questions an employee's legislative duties would still violate the Speech or Debate Clause.

B. This Court Has Held That The President, Who Has No Textual Immunity, Is Absolutely Protected For His Personnel Actions; It Would Be Incongruous To Determine That Members Of Congress Are Less Protected Than The President For Their Personnel Actions

The closest this Court has come to addressing the issue of whether the Speech or Debate Clause precludes federal court adjudication of congressional personnel actions is *Davis v. Passman*, 442 U.S. 228 (1979). *Passman* involved the allegedly discriminatory termination of a female employee of U.S. Congressman Otto Passman. While pretermitting whether the Speech or Debate Clause shielded Representative Passman's conduct, this Court "h[e]ld that judicial review of congressional employment decisions is constitutionally limited only by the reach of the Speech or Debate Clause." *Id.* at 235 n.11. Two dissenting Justices in *Passman* thought that the Speech or Debate Clause issue was "far from frivolous" and could have been dispositive of the case. *Id.* at 251 (Stewart, J., joined by Rehnquist, J., dissenting).

Although this Court has not addressed the issue of whether the Speech or Debate Clause precludes federal court adjudication of congressional personnel actions, this Court's decision in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), supports the soundness of the Dayton Office's test for Speech or Debate Clause immunity. In *Fitzgerald*, the Court addressed the issue of whether the President was absolutely immune for personnel actions taken against a management analyst employed in the Department of the Air Force. The management analyst, Fitzgerald, had given damaging testimony before Congress about cost overruns at the Defense Department. *Id.* at 734 n.1. Fitzgerald's employment was subsequently terminated, and evidence revealed that President Nixon had been involved in

the termination decision. *Id.* at 733, 737. Fitzgerald sued President Nixon and other Executive Branch officials claiming that the termination was in retaliation for Fitzgerald's damaging, congressional testimony. President Nixon, who was no longer in office, asserted absolute immunity. The district court denied the President's claim of absolute immunity, *id.* at 740-41, and the appellate court summarily dismissed the President's collateral appeal for lack of jurisdiction, *id.* at 741, 743. Reversing the lower court's immunity decision, this Court held that although the President has no expressly stated, absolute immunity under the Constitution as do members of Congress, *id.* at 750 & n.31, his absolute immunity can be inferred due to "history" and "constitutional tradition" and the President's "unique position in the constitutional scheme," *id.* at 749. This Court further held that the basis of this inferred, absolute immunity is the separation of powers. *Id.* The President's immunity extends to any action the President takes within his "sphere of responsibility." *Id.* at 760-61 (Burger, C.J., concurring); see also *id.* at 749, 754 (majority opinion) (President has absolute immunity from claims "predicated on his official acts."). The President's constitutional sphere of responsibility includes being Commander in Chief of the Armed Forces. See *id.* at 757; see also U.S. CONST. art. II, § 2. That responsibility, this Court held, "must include the authority to prescribe reorganizations and [employee terminations]." *Fitzgerald*, 457 U.S. at 757. The Court concluded, therefore, that a court could not second guess the President's decision to fire staff who fulfilled duties within the President's sphere of responsibility, even when those staff were as far removed from the President's immediate sphere as was Fitzgerald, a management analyst working at the Pentagon. *Id.* (Fitzgerald's termination "lay well within the outer perimeter of [the President's] authority."). As Chief Justice Burger observed:

> Absent absolute immunity . . . each suit . . . would involve some judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the information on which it was based, and who supplied the information. Such scrutiny of day-to-day decisions of the Executive Branch would be bound to occur . . . . [T]he need to prevent large-scale invasion of the Executive function by the Judiciary far outweighs the need to vindicate the private claims.

Id. at 762 (Burger, C.J., concurring).

Fitzgerald supports the soundness of the Dayton Office's test for immunity because Speech or Debate Clause immunity, like the President's inferred, absolute immunity, is grounded in separation of powers principles. Compare *id.* at 749 (majority opinion) (the President's absolute immunity is "rooted in the constitutional tradition of the separation of powers"), with *United States v. Gillock*, 445 U.S. 360, 370 (1980) (the Speech or Debate Clause "rest[s] solely on the separation of powers doctrine"). Indeed, in his concurrence in *Fitzgerald*, Chief Justice Burger acknowledged that the Court was extending to the President the protections the Speech or Debate Clause affords Members. See *Fitzgerald*, 457 U.S. at 762 (Burger, C.J., concurring) ("We have decided that in a similar sense Members of both Houses of Congress—and their aides—must be totally free from judicial scrutiny for legislative acts."). Further, the purpose of the President's inferred, absolute immunity and the Members' express constitutional immunity is the same -- to allow independent functioning of the coequal branches of government within their respective spheres of constitutional responsibilities. Compare *Helstoski*, 442 U.S. at 491 (purpose of Speech or Debate Clause is to prevent "intrusion by the . . . Judiciary into the sphere of protected

legislative activities"), with *Fitzgerald*, 457 U.S. at 761 (Burger, C.J., concurring) (purpose of President's inferred immunity is to prevent "judicial intervention" into the President's "sphere of responsibility"). Congress's "sphere of responsibility" includes all federal legislative powers. See U.S. CONST. art. I, § 1. Just as the separation of powers prohibits judicial interference with the President's management of an employee whose duties are within the sphere of the President's constitutional duties, so too the separation of powers prohibits judicial interference with a Member's management of an employee whose duties are within the sphere of the Member's constitutional duties.[13]

Neither Article II nor Article III of the Constitution, delineating the powers of the Executive Branch and Judicial Branch, respectively, grants absolute immunity. Thus, the text of the Constitution affords greater independence to the Legislative Branch than to any other branch of government. "It is significant that legislative freedom was so carefully protected by constitutional framers at a time when even Jefferson expressed fear of legislative excess." *Tenney*, 341 U.S. at 375. It would be incongruous for the President to have greater

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[13] Preserving judicial independence is the primary reason the federal judiciary is subject to virtually no federal employment laws. CAA § 505 required the Judicial Conference to report to Congress whether Judicial Branch employees should be governed by the 11 federal employment laws that are the subject of the CAA and to report "any recommendations the Judicial Conference may have for legislation to provide to employees of the judicial branch the rights, protections, and procedures . . . , including administrative and judicial relief, that are comparable to those available to employees of the legislative branch [under the CAA]." 2 U.S.C. § 1434. The Judicial Conference concluded that, to preserve the independence of the Judiciary, such laws should not apply to the judicial branch. See JUDICIAL CONFERENCE OF THE U.S., STUDY OF JUDICIAL BRANCH COVERAGE PURSUANT TO THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995, at 2, 4 (Dec. 1996).

protection from Judicial Branch intrusion in employment decisions than do members of Congress.[14]

C. The D.C. Circuit Should Have Ordered The District Court To Dismiss This Case Because It Cannot Be Adjudicated Without Violating The Speech Or Debate Clause

The D.C. Circuit erred in holding that the district court is not barred from adjudicating this case. Hanson's job duties are part of the due functioning of the legislative process, and, as discussed in section III.A., *supra*, his case is predicated on a legislative act, his termination.

In support of its motion to dismiss in the district court, the Dayton Office submitted evidence demonstrating that Hanson's job duties were part of the due functioning of the legislative process -- that Hanson was an alter ego of Senator Dayton.

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[14] Circuit Judge Randolph found this Court's *Fitzgerald* decision inapposite to this case because the "President's immunity is based on his 'unique position in the constitutional scheme' and the 'singular importance of the President's duties.'" J.S. App. 19a (internal citations omitted). As an initial matter, "[i]n relation to his or her constituents, and in the performance of constitutionally defined functions, each Member of the House or Senate occupies a position in the Legislative Branch comparable to that of the President in the Executive Branch." *Passman*, 442 U.S. at 250 (Burger, C.J., joined by Powell, J., and Rehnquist, J., dissenting). In any event, while the Court in *Fitzgerald* cited the President's "unique position in the constitutional scheme," 457 U.S. at 749, and the "singular importance of the President's duties," *id.* at 751, to justify the Court's inference that the President was entitled to an absolute immunity for his official acts, the Court did so because the President has no textual, absolute immunity. It does not follow that those who do not hold a "unique" position in our constitutional scheme are not protected by an absolute immunity. Members of Congress are entitled to absolute immunity because the Constitution expressly grants it to them; inferring an immunity for them is unnecessary.

Legislating involves a chain of acts beginning at least as early as field work by a staff employee and continuing through committee hearings and voting. Hanson regularly met with constituents, community groups and community leaders to learn, among other things, their concerns and priorities in the healthcare and law enforcement areas, their suggestions regarding legislation Senator Dayton should introduce, and their opinions about whether the Senator should support or oppose certain legislation. J.S. App. 67a-68a ¶¶ 3, 6. Hanson acted as the Senator's eyes and ears in these meetings. Based on the information he gathered, Hanson identified and briefed Senator Dayton about opportunities for legislative initiatives. J.S. App. 68a-71a ¶¶ 6-8; 74a-81a. For example, he identified opportunities for legislative initiatives with respect to raising the mandatory retirement age for federal law enforcement officials, obtaining medicare payments for ambulances, and providing coverage for prescription drugs for disabled Medicare recipients. J.S. App. 68a-71a ¶¶ 7-8; 76a; 80a. Such job duties are part of the due functioning of the legislative process because "'[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.'" *Eastland*, 421 U.S. at 504 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)). Hanson also developed and advised Senator Dayton of legislative solutions to constituent problems, J.S. App. 71a-73a ¶¶ 9-13; 82a-89a, planned a committee hearing, selected topics and witnesses for the hearing, and developed questions for those witnesses, J.S. App. 73a ¶ 14. These acts are also part of the due functioning of the legislative process. See *Gravel*, 408 U.S. at 615, 628-29 (Speech or Debate Clause prohibits questioning concerning the conduct of the Senator or his aides at subcommittee hearing or concerning communications between the Senator and his aides related to the hearing or any other legislative act). Accordingly,

Hanson's job duties were part of the due functioning of the legislative process.

As discussed in Section III.A, *supra*, when a Member takes a personnel action against an employee whose job duties are part of the due functioning of the legislative process, the personnel actions are legislative acts. Therefore, a court cannot adjudicate Hanson's discrimination claims because they are predicated on a legislative act: his termination. Moreover, court adjudication of Hanson's discrimination claims would reveal information about a legislative act, the termination, or the motivation for such an act, or would reveal communications between Senator Dayton and Hanson about the termination. Furthermore, defense of the termination claims would require Senator Dayton to answer -- in terms of defending himself -- for the termination and his motivation for the termination. That is precisely the judicial interference with legislative independence the Speech or Debate Clause prohibits.

In addition, the Speech or Debate Clause bars judicial adjudication of Hanson's claim for overtime payments. Hanson claims that "his job duties did not qualify him as an employee who was exempt from overtime payments under the Fair Labor Standards Act." J.A. 12 ¶ 6. Where an employee, like Hanson, whose job duties are part of the due functioning of the legislative process asserts a claim disputing whether he is exempt from overtime payments, the case cannot be advanced without examining in detail the employee's duties, which is questioning about legislative acts because the job duties are legislative acts. Determining whether that employee is employed in a bona fide executive, administrative or professional capacity, see 29 U.S.C. § 213 (as incorporated by 2 U.S.C. §§ 1313, 1384(a)(1); OC Regulations S541.1-S541.3 (1996), http://www.compliance.gov/employeerights/regs/FLSA-Senate.pdf, and therefore is exempt from overtime

payments requires examining the employee's day-to-day duties, what the employee's primary duty is, the extent to which the employee exercises discretion and independent judgment, and, at least in the case of the administrative exemption, whether the employee performs work of substantial importance to the management or operation of the office. Accordingly, the Speech or Debate Clause bars judicial adjudication of such a claim.

The D.C. Circuit erred therefore in not ordering the district court to dismiss Hanson's case. Circuit Judge Randolph, joined by Chief Judge Ginsburg and Circuit Judges Henderson and Tatel, concluded that the Speech or Debate Clause does not present a jurisdictional bar to Hanson's suit because "it does not appear from . . . Hanson's complaint[] that [Hanson] sought to predicate liability on protected conduct," i.e., on acts within the legislative sphere. J.S. App. 20a. Circuit Judge Rogers similarly found that the Speech or Debate Clause does not bar Hanson's suit because "an examination of the complaint[] makes clear that [Hanson does not need to] rely on legislative acts to make a *prima facie* case." J.S. App. 28a (Rogers, J., concurring in part and in the judgment). The D.C. Circuit erred by limiting its analysis to the face of the complaint. Where the defendant moves for dismissal of CAA claims for lack of jurisdiction on the basis of Speech or Debate Clause immunity and supports its motion with a declaration or other relevant material, as the Dayton Office did, the court should consider the evidentiary material submitted, not just the complaint, in determining whether the Clause bars the court's jurisdiction. Cf. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 184 (1936) (A court may consider materials outside the pleadings to satisfy itself that it has subject matter jurisdiction of a case.). "The entitlement is an *immunity from suit* . . . [that] is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). In most

civil cases, the complaint need not even set forth a prima facie case. See *Swierkiewicz v. Sorema*, 534 U.S. 506, 515 (2002). For example, in a discrimination case, the D.C. Circuit explained that "'[b]ecause racial discrimination in employment is "a claim upon which relief can be granted,".... "I was turned down for a job because of my race" is all a complaint has to say' to survive a motion to dismiss under Rule 12(b)(6)." *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1115 (D.C. Cir. 2000) (quoting *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998)). Finding the complaint to be conclusive on the issue of absolute immunity would eviscerate the protections of the Speech or Debate Clause. See *Tenney*, 341 U.S. at 377 ("The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader . . . .").

The D.C. Circuit also erred by concluding that the Speech or Debate Clause's jurisdictional bar is limited to those cases that are predicated on a legislative act. Even if a case is not predicated on a legislative act, the Clause bars court adjudication of the case if it relies on or requires inquiry into a legislative act or the motivation for that act, or requires the Member to answer -- in terms of defending himself -- for a legislative act.

D. Circuit Judges Brown, Sentelle And Griffith Erred In Concluding That The Speech Or Debate Clause Acts As A Jurisdictional Bar Only When The Defendant Is A Member Or His Aide

Circuit Judge Brown, with whom Circuit Judges Sentelle and Griffith joined, concurring in the judgment, erroneously concluded that the Speech or Debate Clause's jurisdictional bar is inapplicable to CAA actions because the defendant in such suits is not the Member or the Member's alter ego but rather an

"employing office." J.S. App. 45a-53a. The Court has never held that acts within the legislative sphere can form the predicate of a suit or can be questioned or revealed as long as the Member or his aide is not the named defendant. Rather, this Court has consistently held that disclosure and questioning of legislative acts violates the Clause -- period. Indeed, this Court has determined that the Speech or Debate Clause bars adjudication of cases brought against congressional committees, which are "employing offices" under the CAA: "We conclude that the actions of the Senate Subcommittee, the individual Senators, and the Chief Counsel are protected by the Speech or Debate Clause . . . and are therefore immune from judicial interference." *Eastland*, 421 U.S. at 501; cf. *Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 733-34 (1980) (observing that if state legislature, rather than state supreme court, had passed the state's Bar Code and "suit had been brought against the legislature, its committees or members," absolute legislative immunity would bar the suit); *Tenney*, 341 U.S. at 379 (legislative committees can invoke legislative privilege). Accordingly, the conclusion of Circuit Judges Brown, Sentelle and Griffith is inconsistent with this Court's Speech or Debate Clause jurisprudence.

Regardless of who the defendant is, allowing Hanson's suit to proceed would violate the Speech or Debate Clause by allowing intrusion of the judiciary into the legislative sphere, including referencing past legislative acts, judging a Member's motives as to such acts, and imperiling legislative independence. See, *e.g.*, *Helstoski*, 442 U.S. at 490; *Eastland*, 421 U.S. at 502-503; *Brewster*, 408 U.S. at 512.

E. The "Functional Approach" To Immunity Questions, As Articulated In The Court's *Forrester* Decision, Does Not Apply To The Speech Or Debate Clause Immunity Analysis

The D.C. Circuit erroneously relied on *Forrester v. White*, 484 U.S. 219 (1988), in rejecting the Dayton Office's claim of immunity. See J.S. App. 9a-10a. In *Forrester*, a female probation officer brought an action against her employer, a state judge, who had demoted and then discharged her. *Forrester*, 484 U.S. at 220-21. The plaintiff alleged, *inter alia*, that the judge had discharged her due to her gender, in violation of 42 U.S.C. § 1983 and Title VII of the Civil Rights Act of 1964. *Id.* at 221. The district court granted the defendant judge's motion for summary judgment on the ground that he was entitled to judicial immunity from civil damages suits. *Id.* at 222. The plaintiff appealed, and the Court of Appeals for the Seventh Circuit affirmed. *Id.* Reversing and remanding, this Court held that when determining whether a state actor is protected by common law official immunity, a court must examine the type of action taken by the official; if the action is merely administrative in nature, then immunity is not extended to the state actor. *Id.* at 227-29. The Court concluded that the state judge's demotion and termination of the employee were merely administrative acts, not "judicial acts," and, therefore, no immunity applied. *Id.* at 229-30.

The D.C. Circuit's reliance on *Forrester* was misplaced for several reasons. First, *Forrester* addressed common law immunity applicable to a state judge, not Speech or Debate

Clause immunity.[15] The two immunities are quite different from each other. "[J]udicial immunity affords less protection than legislative immunity under the Speech or Debate Clause." *Eades v. Sterlinske*, 810 F.2d 723, 725 n.1 (7th Cir. 1987) (citing *Dennis v. Sparks*, 449 U.S. 24, 30 (1980)). Furthermore, Speech or Debate Clause immunity protects the separation of powers among independent, coequal branches of the federal government. See *Gillock*, 445 U.S. at 369-70. The separation of powers doctrine does not apply to the federal judiciary's relationship to the states because the federal judiciary and the states are not independent, coequal branches of government. As the Court explained in *Gillock*:

> [T]he Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power. Thus, under our federal structure, we do not have the struggles for power between the federal and state systems such as inspired the need for the Speech or Debate Clause . . . .
>
> . . . [F]ederal interference in the state legislative process is not on the same constitutional footing with

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[15] In her petition for writ of certiorari, Ms. Forrester argued that a split existed between the circuits. She identified one side of the split as the Seventh Circuit's decision in *Forrester* and the D.C. Circuit's *Browning* decision, which had held, respectively, that personnel actions of a state judge and of a federal legislator were protected by an absolute immunity. She identified the other side of the split as *Goodwin v. Circuit Court*, 729 F.2d 541 (8th Cir. 1984), and *Davis v. Passman*, 544 F.2d 865 (5th Cir. 1977), which had held, respectively, that personnel actions of a state judge and of a federal legislator were *not* protected by an absolute immunity. In granting certiorari, this Court identified the relevant circuit split as being established by only *Forrester* and *Goodwin*, the two cases involving state actors protected by common law official immunity. See *Forrester*, 484 U.S. at 222-23.

> the interference of one branch of the Federal Government in the affairs of a coequal branch.

445 U.S. at 370. Thus, common law immunity does not preclude the federal judiciary from intruding into a state actor's sphere of responsibility and questioning the state actor about matters at the heart of that sphere. Compare *Gillock*, 445 U.S. at 366-67, 373 (holding that in criminal actions common law immunity does not protect a state legislator's participation in committee hearings, floor speeches or votes, but recognizing that the Speech or Debate Clause does protect a federal legislator for those same activities), with *Eastland*, 421 U.S. at 502 (Speech or Debate "Clause provides protection against civil as well as criminal actions . . . .").

Second, in *Forrester*, the Court stated that the functional approach is inapplicable when Speech or Debate Clause immunity is involved. *Forrester*, 484 U.S. at 224 ("Running through our cases, with fair consistency, is a 'functional' approach to immunity questions *other than those that have been decided by express constitutional or statutory enactment*.") (emphasis added).

Third, in *Forrester*, this Court found that a state judge's administrative acts, even administrative decisions that are "essential to the very functioning of the courts," are not protected by judicial immunity. *Id.* at 228. In contrast, this Court has held that Speech or Debate Clause immunity covers any act that is part of "the *due* functioning of the [legislative] process," *Brewster*, 408 U.S. at 516, and that the judicial branch should not possess "directly or indirectly, an overruling influence over [legislators] in the administration of their . . . powers," *Johnson*, 383 U.S. at 178 (quoting THE FEDERALIST NO. 48 (James Madison) (Cooke ed., 1788)). Thus, while judicial immunity does not prohibit courts from interfering with

the functioning of the courts, Speech or Debate Clause immunity does prohibit courts from interfering, directly or indirectly, with the due functioning of the legislative process.

Finally, this Court has never suggested, let alone held, that Speech or Debate Clause immunity does not shield administrative acts that are within the legislative sphere. Rather, the Court has consistently held that *all* acts that are within the legitimate legislative sphere are protected. See *Eastland*, 421 U.S. at 503; *McMillan*, 412 U.S. at 312-13; *Gravel*, 408 U.S. at 624-25. Indeed, in *McMillan*, the Court determined that the acts of congressional functionaries -- printing documents and sending them to such places as law firms -- are protected by the Speech or Debate Clause if those acts are within the legitimate legislative needs of Congress.[16] *McMillan*, 412 U.S. at 317. Although printing and mailing are administrative acts, that fact did not enter the Court's analysis as to whether those acts were protected; rather, the Court focused solely on whether any part of the printing and public distribution of documents was outside the legislative sphere. *Id.* at 318, 324. The Speech or Debate Clause immunity governs *all* acts, which by definition includes administrative acts, that are within the legislative sphere.

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[16] Because the record before the Court in *McMillan* provided "little basis for judging whether the legitimate legislative needs of Congress, and hence the limits of immunity, ha[d] been exceeded," the Court remanded the case for a determination of whether the functionaries' administrative acts were within the legitimate legislative sphere. *McMillan*, 412 U.S. at 324-25. On remand, the district court found that the functionaries' acts, including printing and mailing documents to law firm libraries, were within the legitimate legislative sphere and dismissed the complaint as to them based on Speech or Debate Clause immunity. *Doe v. McMillan*, 374 F. Supp. 1313, 1316 (D.D.C. 1974). The D.C. Circuit affirmed. *Doe v. McMillan*, 566 F.2d at 715, 718.

CONCLUSION

The Court should accept jurisdiction of this appeal pursuant to CAA § 412. If the Court concludes that CAA § 412 does not provide a basis for appellate jurisdiction, then the Court should treat the Dayton Office's Jurisdictional Statement as a petition for a writ of certiorari and should grant the petition.

Because the Dayton Office no longer exists and there is neither a successor defendant nor a statute providing for non-abatement of this litigation, the Court should dismiss this case as moot.

If the Court does not dismiss this case as moot, the Court should reverse the judgment of the court of appeals and should remand with instructions to dismiss on the ground that the Speech or Debate Clause is a jurisdictional bar to this action.

Respectfully submitted.

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APPENDIX

APPENDIX

Facilities and Furnishings, Paper and Mailing Allowances

Office Space

This section provides information on Senators' Washington, D.C., office space, and home state and mobile office space.

Washington, D.C., Office

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Assignment of Washington, D.C., Office Space Based on Seniority

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Vacation of Office Space

Senators not serving in the succeeding Congress must vacate offices on term expiration. For guidance in closing an office, as well as for procedures if office vacation results from a Senator's death or resignation, see **"Appendix I-C: Closing a Senator's Office".**

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Flag Operations

The Senate Stationery Room and Printing, Graphics and Direct Mail (PG&DM) assist Senate offices with the processing of constituent requests to have American flags flown over the United States Capitol. Constituents send Member offices flag requests along with a check covering the cost of the type of flag they wish to order. Total cost includes the flag price, shipping fees, and the flag flying and certification fee. Prices for various types of flags can be obtained from the Stationery Room.

Important! Constituents must make checks payable to the Keeper of the Stationery.

The following section describes how a Senate staffer obtains a flag and has it flown over the Capitol building after the Member office receives the flag request.

How To Obtain and Fly a Flag

1. Senate office receives flag order form and check or money order from constituent.

2. Senate office completes Flag Request Form and prepares a mailing label. Flag Request Forms are obtained from PG&DM and include the following information:

    - name of member office that received the flag request

- name of constituent or organization for whom the flag will be flown
- type of flag being requested
- message that will be printed on the flag certificate
- expected date the flag is to be flown
- instruction for disposition of the flag after it is flown

3. Senate office writes the Senator's name on check or money order and purchases flag -- along with necessary cards that indicate flying/certification and shipping charges have been paid -- from the Senate Stationery Room.

4. Senate office takes flag, Flag Request Form and flying/certification and shipping cards to the Packaging and Flags section of PG&DM (SDG-82).

5. PG&DM personnel deliver the flag to the Architect of the Capitol Flag Office in the Capitol where staff fly the flag and create a certificate.

6. PG&DM personnel will either deliver the finished flag to the Senate office or ship it directly to the constituent.

7. If a constituent does not request that a flag be flown on a specific date, Senate offices can purchase flags that have been pre-flown over the Capitol. These flags also are purchased in the Senate Stationery Room and cost the same as flags that are to be flown on a particular date. Pre-flown flags contain a certificate that certifies the flag was flown over the U.S. Capitol. The Member office can elect to prepare a second certificate that includes the constituent's name and references an occasion. Senate office staff prepares a mailing label and deliver the pre-flown flag to PG&DM for shipment.

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Mass Mailings

PG&DM Printing and Mailing Services processes all mass mailings and Customer Service Records reports Senate offices' postage usage and other costs for mass mailings to the Disbursing Office. Customer Service Records also provides a monthly report of postage records and quarterly report which includes postage and overhead costs for mass mailings to Senate offices. Senate offices should review these reports for accuracy and notify Customer Service Records of discrepancies. Customer Service Records provides monthly Certification of mass mail charges to the Disbursing Office and Senate Offices.

Each Senate office is responsible for reporting mass mailings to the Office of Public Records on a monthly basis.

Appendix I-C: Closing a Senator's Office

Introduction

This appendix (revised in March 2004) highlights information about closing a Senator's office that concerns staff, office expenditures, the disposition of furniture, equipment, and Senatorial records, the use of computer-based systems and services, and the use of the mailing frank. Special reference is also provided to the variations in law and procedure that apply in each of the above-mentioned circumstances.

The following sections provide the four reasons for closing a Senator's office.

I. Expiration of the Regular Term of Office

Term of Office

A Senator's regular term of office officially expires at noon on January 3 of the year in which such term ends.

Note: Although the regular 6-year term is from noon, January 3 to noon, January 3, the 6-year period for pay and allowances, including staff salaries, has been established for accounting purposes as being from the full day of January 3 through the full day of January 2.

Staff

Employees in the office of a Senator who remains in the Senate until the expiration of their regular term of office and who was not a candidate for reelection, remain on the payroll until the *close of business on January 2* of the year in which the Senator's term of office expires, unless terminated sooner.

Pursuant to S. Res 478 (108-1), employees in the office of a Senator who remains in the Senate until the expiration of their regular term of office, will not be serving as a Senator in the next term and was a candidate for reelection, remain on the payroll for a period not to exceed 60 days following the staff member's date of termination or until the staff member becomes otherwise gainfully employed, whichever is earlier. (See section 73 of the *Senate Manual*, 2001 Edition - reprinted at the end of **Appendix I-C: Closing a Senator's Office.)**

Office Expenses

No obligations may be incurred after the last day of the Senator's service.

Franking Privilege

The Senator is entitled to use the mailing frank until the expiration of the 90-day period immediately following the date of leaving office. If the Senator is an appointee whose term has expired, the frank may be used for matters of official business related to the closing of the office.

Travel

All official travel must be completed by the end of the Senator's term of office. Staff relocation to the home state (transfer to another duty station) is not reimbursable regardless of when it occurs.

II. Resignation

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Office Accounts

The following office accounts should be reviewed and cleared as quickly as circumstances permit:

- Restaurant (224-5776)
- Recording Studio (224-4977)
- Stationery (224-4771)
- Senators' Official Personnel and Office Expense Account (224-3205)
- Photographic Studio (224-6000)
- Attending Physician (225-5421)
- Library of Congress (707-5441)
- Law Library (707-5079)
- Senate Library (224-7106)

The Disbursing Office is authorized by law to withhold the Senator's and staff's final paychecks if accounts with the Recording Studio, the Senate Restaurant, or the Stationery Room do not reflect a zero balance.

Official Expenditures

The official office expense account portion of the Senators' Official Personnel and Office Expense Account of each Senator is available for expenses incurred up to and including the Senator's last day of service.

Travel Expenses

Expenses for the relocation of employees to the home state or within the state are not reimbursable.

Telephone

Telephone expenses cannot be officially incurred beyond the Senator's last day of service. Contact the Telecom Services of the Sergeant at Arms' office (224-4300) to terminate telephone service in the Washington, DC and home state office(s).

Subscriptions

All subscriptions should be canceled by the Senator's office. Yearbooks and other annual publications must be canceled along with newspapers and magazines. Refunds received, as the result of the cancellation of a previously paid subscription must be returned to the Disbursing Office. See **"Refunds of Vouchered Expenses" in Chapter IV – Financial Management.**

Stationery

Official purchases may be made at the Stationery Room (224-4771) up to and including the last day of the Senator's service.

Mailing and Delivery Expenses

Unused postage stamps for which reimbursement was received from the Senators' Account should be returned to the Disbursing Office. Shipment of a Senator's official records may be paid from the Senators' Account. Personal items may not be shipped at Senate expense.

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The Post Office and the Mail

Regular mail delivery by the Senate Post Office will normally end on the last day of the Senator's service, although different arrangements may be made in the event of the death or resignation of the Senator. The Senate Post Office will forward first class mail to the Senator's forwarding address until January 31 of the year following the Senator's departure. After one year, all mail is returned to sender. It is recommended that the Senator's staff make every effort to remove the Senator's name from mass mailed materials prior to departure by contacting the Senate Post Office (224-5353). If the

Senator's staff does not remove the Senator's name from this mass mail material, the Senate Post Office will remove the Senator's name as of February 1st of the year following the Senator's departure. Second, third, and fourth class mail will be handled by the Senate Post Office as requested.

Mail addressed to Senate staff is not forwarded by the Senate Post Office. Individual staff members are requested to notify correspondents of their new addresses.

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Allocated Products and Services

Overview and General Information

This section provides information on the information technology, telecommunications and general office equipment and services that the Committee on Rules and Administration has authorized the Office of the Sergeant at Arms to provide. In most cases these services are provided on an allocation basis – either through economic allocations that allot funds for offices to use to acquire specific items or services or through numeric allocations that allot specific numbers of items to each office. General information on the allocation types and the rules and regulations that apply to all offices is below, followed by information on the specific allocations that apply to each type of office. The Sergeant at Arms Customer Support organization is available to assist offices with making the choices necessary to effectively set up and operate a Senate office.

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Economic Allocation Program

The Sergeant at Arms provides computers and associated equipment through the Economic Allocation Program established by the Committee on Rules and Administration. Through this program, offices are given an allotment of funds with which they can purchase standard equipment. If an office desires to have more, or different, equipment than is provided for in the allocations, it may use its official office funds to acquire and maintain that equipment. For more information, see **"Acquisition Procedures"**. All equipment purchased through the Economic Allocation Program is also subject to the restrictions below:

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The Constituent Service System Fund

The Sergeant at Arms allocates a certain amount of funds to each Member's office, according to the Member's state population, to pay costs for acquiring, installing, training, and maintaining hardware and software required to support an approved system for constituent correspondence management.

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Office Financial Management Activities

Each Senator has the fiduciary responsibility for ensuring that funds spent from his allocation of the Senators' Account are used for official purposes. A bookkeeping system should be used to keep information up to date concerning:

- Current balance available for general expenditures;
- Totals spent in each expenditure category; and
- Monthly and yearly totals to date.

These records should be reconciled periodically with the balances provided by the Disbursing Office reports to ensure that they are in agreement.

Automated System for Voucher Preparation and Financial Management

The Senate provides access to an automated system for voucher preparation and financial management, Web FMIS, which is used by offices, committees, leadership and support offices. The system enables an office to:

- Produce printed vouchers
- Streamline production of vouchers from Expense Summary Reports created via the SAVI system

- Submit vouchers for on-line review by the Disbursing Office staff and for sanctioning by the staff of the Committee on Rules and Administration
- Produce printed travel advance requests
- Track the status of vouchers as they progress through the payment process
- Obtain payment information on any voucher
- Communicate with the Disbursing Office staff regarding changes to vouchers
- Budget the allowance
- Set aside funds for future use
- Create a deposit document to accompany a refund check
- Print a variety of reports showing summary budget-to actual expenditures and detailed voucher level information
- Reconcile Web FMIS records with the monthly report, "Official Personnel and Office Expense Account Summary Report" sent by the Disbursing Office

To use Web FMIS the office manager (or other designated staff) needs a Senate-owned PC with Internet Explorer and Adobe Acrobat Reader (both of which are on the standard Senate template), access to a laser printer, and authority to see voucher information for his or her office.

If the office has this hardware and software, there is no additional cost involved in using Web FMIS. Additional software and training are provided by the Disbursing Office.

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Overtime

Overtime hours are tracked and approved by the employing office. Overtime wages to be paid must be certified by the employing office and submitted to the Disbursing Office for payment on a regularly scheduled payday. See the discussion of the Congressional Accountability Act in Chapter I for information about requirements of the Fair Labor Standards Act.

Payment of overtime is authorized by submitting to the Disbursing Office (SH-127) an Overtime Report signed by the Senator, Committee Chairperson, or Officer of the Senate on whose payroll the individual worked during the time the overtime was incurred.

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Employment Eligibility Confirmation

Every Senate office is required to comply with the Immigration Reform and Control Act (IRCA) by completing Form I-9 for each new hire and by reviewing certain documents to verify that each new hire is authorized to work in the United States. Form I-9 contains a list of the documents an employing office must review for each employee.

In addition to the above requirement, **every** Senate office **must** register for and participate in the *Basic Pilot Program for Employment Eligibility Confirmation* established by the Department of Homeland Security and the Social Security Administration. This is required by the Illegal Immigration Reform and Immigrant Responsibility Act. Pursuant to that law, each office **must** electronically verify the work authorization of every employee that office hires.

You should contact the Office of the Senate Chief Counsel for Employment (4-5424) if you have any questions regarding these laws.